In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 152.

DE LAMAR'S NEVADA GOLD MINING COMPANY,
Plaintiff in Error,

vs.

JAMES NESBITT, Defendant in Error.

DEFENDANT'S BRIEF.

STATEMENT OF THE CASE.

This is an action brought by the defendant in error in the District Court of the Fourth Judicial District of the State of Nevada in and for the County of Lincoln upon a protest and adverse claim against the application of one William M. Davidson for a patent from the Government of the United States, to certain mining ground, designated and described as the "Sleeper" mine and mining claim, which is claimed to have been located on the first day of January, A. D. 1895.

The defendant in error bases his protest and adverse claim upon the "Fraction" mine and mining claim, which was located on or about the 15th day of May, A. D. 1892, by A. Borth, one of his present co-owners, and W. L. De Beque and H. Stevens, whose interests he and his other co-owner, George Nesbitt, have acquired by purchase at judicial sale in actions brought against them by the said defendant in error and said George Nesbitt (Record, pp. 66 and 77).

Pending the trial of the case and prior to his transfer to the plaintiff in error, the said William M. Davidson asked leave to file an amended answer, duly verified by himself, in which he claimed title to the ground in dispute by virtue of a new location, made pending the trial, and denied the validity of the Sleeper location, upon which he had originally applied for a patent (R., p. 9).

On trial in the State District Court, a judgment and decree was rendered for plaintiff—the defendant in error. On appeal to the State Supreme Court, this judgment and decree was affirmed and a petition for a rehearing denied (R., pp. 84–89).

Whereupon plaintiff in error presented its petition for a writ of error to the Hon. Joseph McKenna, a Justice of this Court, which appears in the printed record (R., p. 93), but there are no assignment of errors in the Record, except such as are embraced in the petition for the writ.

I.

Argument.

We submit that the writ of error should be dismissed for the following reasons:

First: There are no assignment of errors as required by Sec. 997 of the Revised Statutes and Rule 35 of this Court; the petition for the writ not being a part of the record, although it appears among the papers which constitute the record. See Warfield *vs.* Chaffe, 91 U. S., 690.

Second: (1) The validity of no law of the United States was drawn in question in the Courts of the State of Nevada in this case, and the counsel for plaintiff in error only claim that the final decision of this Court "fairly and clearly depends upon the proper *construction* to be given to said Special Acts of 1893 and 1894, etc." We quote as a matter of argument from the petition for the writ of error, which appears

in the printed record at page 96. That part of Sec. 25 of the Judiciary Act of 1789 (1 Stat., 25) which gave to this Court appellate jurisdiction in cases decided in the highest court of a State, "when is drawn in question the *construction* of any clause of the Constitution or of a treaty or Statute" of the United States, was repealed by Sec. 2 of the Act of 1867 (14 Stat., 385).

The plaintiff in error did not claim any rights under the Acts of 1894 and 1893, and consequently none could be denied it. Section 2 of the Act of 1867 is the same as Sec. 709 of the Revised Statutes.

The only right, title, privilege, or immunity set up or claimed by the plaintiff in error or its grantor, William M. Davidson, was the right to purchase certain mineral grounds from the Government of the United States. This right depended entirely on evidence alone, and this Court will not examine the evidence on a writ of error.

See Mrs. Lillian W. Egan and husband, plaintiff in error, *vs.* A. Hart, H. B. Richardson, and F. M. Kerr, defendants in error, 165 Vol. U. S. Sup. Court R., p. 188 and cases cited.

If this Court could review the evidence it would certainly feel itself bound to find that the plaintiff in error had no right to the patent applied for by Davidson, the original defendant, when he, by a solemn judicial admission, under oath, and before he had transferred his rights to the plaintiff in error, admitted that he had no right to the patent at the time he applied for it. See his amended answer (R., p. 9).

Third: The decision of the State court was based entirely upon the Statutes and rules of general jurisprudence of the State, and for that reason will not be reviewed by this Court.

See opinions of Court (R., pp. 84–89) and W. P. Sayward, plaintiff in error, *vs.* Arthur A. Denny *et. al.*, executors, defendants in error, 158 U. S. Sup. Court R., p. 180; Quinby *vs.* Boyd, 128 U. S., 502.

II.

On the Merits.

First: All the proceedings in the cases of Nesbitt *vs.* Stevens and De Beque (R. from p. 58 to p. 84) were valid.

(1) The objection that the summons was made returnable more than ten days from its issuance is answered by the Statute (General Statutes of Nevada, Sec. 3539), which reads as follows:

"Second: When the defendant is a non-resident of the township or city, or when the plaintiff is a non-resident, it shall be returnable not more than two days from its date, and shall be served at least one day before the time for appearance, except in cases when it is to be served by publication, or out of the State, or by posting notices thereof, when it shall be made returnable at any time designated by the justice, not less than six weeks nor more than four months from its issuance."

See also, Coffin *vs.* Bell, 22 Nev., 169.

(2) The affidavits and orders for the publication of summons were sufficient.

See Statutes of Nevada, 1889, page 22, which reads as follows:

"When the person on whom the service is to be made resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, or, being a corporation or joint stock association, cannot be served as provided in section twenty-nine, and the fact shall appear by affidavit, to the satisfaction of the court or judge thereof, and it shall appear, either by affidavit or a verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons." See also:

Woodward *vs.* Brown, 51 Pac. Rep., p. 7.

And even if they are not sufficient as between the parties

in the same suit their deficiency cannot be inquired into in this action by entire strangers to the proceedings.

Penoyer *vs.* Neff, 95 U. S., 721.
Sharp *vs.* Daugney, 33 Cal., 506.
Hahn *vs.* Kelly & Morse, 34 Cal., 391.
Quivey *vs.* Kennedy, 37 Cal., 458.
Reeve *vs.* Kennedy, 43 Cal., 643.
People *vs.* Mullan, 65 Cal., 395.
12 Amer. and Eng. Ency Law, 148 J. and note.

(3) The justice court obtained jurisdiction of the subject-matter of the action by the attachment of the mines, and the presumption is that the subsequent proceedings were regular.

Second: The counsel for plaintiff in error admitted in their brief and argument before the Supreme Court of the State of Nevada that an attachment levied on a mining claim would be such a right and interest as could be protected from forfeiture by the attaching creditors' doing the annual work, and that is this case, if no judgments had been rendered; but the certificate of sale (R., pp. 65 and 75) gave an equitable color of title, and the deeds (R., pp. 66 and 77) gave color of title which could ripen into title, which could be protected as against strangers.

Tryon *vs.* Huntoon, 67 Cal., 325.
Field *vs.* Columbet, 4 Sawyer, 52.
Hall *vs.* Law, 102 U. S., 466.

Third: That the defendant in error, and his co-owner, George Nesbitt, claimed title in good faith from the time the interests of De Beque and Stevens was sold to them is not disputed; and that Borth recognized them as his co-tenants from the time of the sale is equally undisputed. Thus, they were all "claimants" within the meaning of the Act of Congress of July 18, 1894 (Statutes of 1893–4, p. 114), which was a copy of the Act of November 3, 1893.

Morrison's M. Rights, 87.
Lindley on Mines, Sec. 633.

Fourth: The notices of their intention to claim and work the mine, filed in 1893 and 1894, were sufficient (R., pp. 79 and 80). See Statutes cited *supra*.

15 Morrison's M. Reports, 335.

Borth, for whom this action was prosecuted, as well as for the defendant in error and George Nesbitt (R., p. 1), was an original locator of the "Fraction" mining claim (Notice of Location, R., p. 83) and has always done and performed everything required by law, to preserve and protect his rights. He caused the notices of intention to claim and hold the mine under the Statutes of 1893–4, *supra*, to be recorded, and performed his share of the work, always in connection with the Nesbitts, whom he recognized as his co-owners, and kept the "Fraction" mining claim intact. His interest was certainly never forfeited, and consequently the "Fraction" mining claim was never forfeited. (See his testimony on recall, R., p. 37, *et seq.*)

All presumptions are against forfeitures. To establish a forfeiture the law must be beyond cavil, and the evidence beyond doubt.

Lindley on Mines, Sec. 645 and notes.

Fifth: We respectfully call the particular attention of the Court to the opinion of the Supreme Court of the State of Nevada in response to the petition of plaintiff in error for a rehearing in that Court (R., p. 89), which is a complete answer to all of the contentions of the plaintiff in error in this Court.

We, therefore, respectfully submit that the writ of error should be dismissed or that the judgment of the Supreme Court of the State of Nevada should be affirmed.

WALTER A. JOHNSTON,
Attorney for Defendant in Error.

GEORGE S. SAWYER,
Of Counsel.